78-1513

No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

JURISDICTIONAL STATEMENT

WADE H. MCCREE, JR.
Solicitor General

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions involved	2
Statement	3
The questions are substantial	6
Conclusion	13
Appendix A	1a
Appendix B	5a
Appendix C	8a

CITATIONS

Cases:

Califano v. *Aznavorian*, No. 77-991 (Dec. 11, 1978)	8
Califano v. *Boles*, No. 78-808, prob. juris. noted (Jan. 22, 1979)	11
Califano v. *Jobst*, 434 U.S. 47	8
Edelman v. *Jordan*, 415 U.S. 651	11
Gentry v. *United States*, 546 F.2d 343	4, 5, 7
Jenkins v. *OPM*, Civ. No. 78-0317 (D. D.C. Nov. 9, 1978), appeal pending, No. 79-1199 (D.C. Cir.)	7, 12
Jimenez v. *Weinberger*, 417 U.S. 628	7
Lalli v. *Lalli*, No. 77-1115 (Dec. 11, 1978)	6, 8, 9
Mathews v. *DeCastro*, 429 U.S. 181	8
Mathews v. *Lucas*, 427 U.S. 495	6, 7, 8

Cases—Continued

	Page
Myers v. *Commissioners of Civil Service Comm'n*, Civ. No. 8682 (S.D. Ohio Aug. 8, 1977)	7
Nevada v. *Hall*, No. 77-1337 (Mar. 5, 1979)	11
Proctor v. *United States*, 448 F. Supp. 418	4, 7
Quern v. *Jordan*, No. 77-841 (Mar. 5, 1979)	11
Tenny v. *United States*, 441 F. Supp. 224	7
United States v. *King*, 395 U.S. 1	11, 12
United States v. *Testan*, 424 U.S. 392	11, 12
Vance v. *Bradley*, No. 77-1254 (Feb. 22, 1979)	8
Visor v. *United States*, Civ. No. 9922(2) (E.D. Mo. Feb. 12, 1955)	4

Constitution and statutes:

United States Constitution, Fifth Amendment, Due Process Clause	2, 5, 8
Act of August 29, 1972, Pub. L. No. 92-415, Section 1, 86 Stat. 652	12
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111	4
Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*	3
5 U.S.C. 8339(j)	4
5 U.S.C. 8341	4, 10
5 U.S.C. 8341(a)	2
5 U.S.C. 8341(a)(3)(A)	2, 7
5 U.S.C. 8341(d)	4
5 U.S.C. 8341(e)	9

Constitution and statutes—Continued

	Page
5 U.S.C. 8341(e)(2)	9
5 U.S.C. 8345	9
5 U.S.C. 8345(h)(2)	9
5 U.S.C. 8346(b)	10
62 Stat. 55	4
5 U.S.C. 702	12
28 U.S.C. 1491	3, 12

Miscellaneous:

H.R. 2584, 96th Cong., 1st Sess. (1979)	10
H.R. Rep. No. 92-1023, 92d Cong., 2d Sess. (1972)	12
Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037	4
S. 509, 96th Cong., 1st Sess. (1979)	10
S. Rep. No. 92-1066, 92d Cong., 2d Sess. (1972)	12

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v.

PATRICIA ILENE CLARK, GUARDIAN FOR SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE UNITED STATES COURT OF CLAIMS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the Court of Claims (App. A and B, *infra*, 1a-7a) are not reported.

JURISDICTION

The final judgment of the Court of Claims (App. B, *infra*, 5a-7a) was entered on November 6, 1978. A notice of appeal was filed on December 5, 1978 (App. C, *infra*, 8a). On January 29, 1979, the

Chief Justice extended the time within which to file a jurisdictional statement or petition for a writ of certiorari to and including April 4, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1252. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975); *Parker* v. *Levy*, 417 U.S. 733, 742 n.10 (1974).

QUESTIONS PRESENTED

1. Whether 5 U.S.C. 8341(a)(3)(A) of the Civil Service Retirement Act violates the Due Process Clause of the Fifth Amendment by permitting illegitimate children of a deceased federal employee to recover survivors' annuities only if they "lived with the employee * * * in a regular parent-child relationship."

2. Whether sovereign immunity bars the award of retroactive monetary relief to persons denied such annuities under a statute later held unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Civil Service Retirement Act, 5 U.S.C. 8341(a) provides in pertinent part:

> (3) "child" means—
>
> (A) an unmarried child under 18 years of age, including (i) an adopted child, and (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship * * *.

3. 28 U.S.C. 1491 provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort * * *. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just * * *.

STATEMENT

The Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*, authorizes annuities to be paid to eligible civil servants and certain of their relatives. In the event of the death of an eligible employee who

elected a survivors' annuity (see 5 U.S.C. 8339(j)), Section 8341 provides that the employee's surviving spouse and each surviving "child" shall receive annuities in amounts provided for in Section 8341(d). Section 8341 defines a "child" as "an unmarried child under 18 years of age, including [a] recognized natural child who lived with the employee * * * in a regular parent-child relationship." Since 1956, when the "lived-with" requirement was added to the Act, it has been consistently interpreted by the Civil Service Commission (now the Office of Personnel Management)[1] to forbid annuities to any illegitimate child who did not live with the deceased employee in a normal parent-child relationship.[2]

---

[1] As a result of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, and Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037, the Civil Service Commission was abolished effective January 1, 1979, and its functions were divided between two new agencies. The Office of Personnel Management assumed responsibility for, among other things, the retirement program for civil servants.

[2] Survivors' annuities were first added to the Act in the 1948 amendments. 62 Stat. 55. Under the 1948 amendments any "child" was eligible, but the Civil Service Commission construed the word "child" to exclude illegitimate children. *Visor* v. *United States*, Civ. No. 9922(2) (E.D. Mo. Feb. 12, 1955), slip op. 2, however, held that "child" included illegitimate children, and the Commission acquiesced in this decision. In 1956 Congress amended the Act to insert the lived-with provision. Although this provision did not expressly exclude any child from receiving benefits, the legislative history suggests that Congress intended to provide no benefits to illegitimate children who did not live with the parent. This construction was accepted in *Proctor* v. *United States*, 448 F. Supp. 418 (D.D.C. 1977). But see *Gentry* v. *United States*, 546 F.2d 343, 356 (Ct.Cl. 1976) (Skelton, J., concurring) (the definition should not be construed to exclude illegitimate children, in view of constitutional issues thereby raised).

Shawn and Tricia Clark are illegitimate children of a deceased federal employee. They were denied survivors' annuities solely because of the lived-with requirement. They filed this suit in the Court of Claims, seeking to recover all payments they would have received but for the lived-with requirement.

On appellees' motion for summary judgment, the court held that the lived-with requirement violates the Due Process Clause of the Fifth Amendment. Relying on its previous decision on the identical issue in *Gentry* v. *United States*, 546 F.2d 343 (1976), the court held that the lived-with requirement impermissibly discriminates between legitimate and illegitimate children solely on the basis of their status at birth (App. A, *infra*, 3a).[3] The court adjudged the liability issue in favor of appellees and remanded to the trial division to determine the amount to be awarded (*id.* at 4a).

The parties then stipulated that the amount of annuity payments due appellees from the date of their father's death on June 2, 1972, through June 29, 1978, was $14,162.66. On November 6, 1978, the court entered a judgment (i) requiring the United States to pay that amount to appellees and (ii) requiring the Civil Service Commission to place respondents on the annuity rolls from June 30, 1978, through the expiration of their eligibility (App. B, *infra*, 6a-7a).

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[3] The government conceded that *Gentry* was dispositive in the Court of Claims but reserved the issue for appeal to this Court. Defendant's Response to Plaintiffs' Motion for Summary Judgment at 2 (filed Oct. 3, 1977).

THE QUESTIONS ARE SUBSTANTIAL

The Court of Claims has held an Act of Congress unconstitutional. In doing so, the court applied an incorrect standard. The court also lacked jurisdiction. Review by this Court of these issues is appropriate.

1. The Constitution does not require identical treatment of legitimate and illegitimate children. The government may treat illegitimate children differently if the differences "bear an evident and substantial relationship to the particular state interests" the statute is designed to serve. *Lalli* v. *Lalli*, No. 77-1115 (Dec. 11, 1978), slip op. 8 (plurality opinion).

The lived-with requirement satisfies this test. The Act is designed to assist the dependents of a deceased civil servant. The legitimacy of a child may be taken as an indication of dependence. See *Mathews* v. *Lucas*, 427 U.S. 495, 511 (1976). Although it would be impermissible to legislate on the assumption that no illegitimate children are dependent on their natural parents (*ibid.*), Congress can require illegitimate children to show dependence in fact as a precondition to eligibility for benefits that arise out of the child's relationship with the parent. The lived-with requirement is a reasonable approach to determining dependence in fact. That an illegitimate child maintained or intended to maintain[4] a regular parent-

[4] The Office of Personnel Management has construed the lived-with clause to require that the child have lived with the employee at the time of his death or, if the child resided elsewhere, that the child have lived with the employee in the past and that the employee and the child have intended, at the time of the death, for the child to resume living with the employee in the near future.

child relationship with the deceased employee at the time of the employee's death is a strong indication of the dependence of that child. This factor bears an "evident and substantial relation" to the goal of the Act.

The Court of Claims held in this case and in *Gentry* v. *United States*, 546 F.2d 343 (1976), that 5 U.S.C. 8341(a)(3)(A) is unconstitutional because the lived-with requirement frustrates the goal of the Act by denying annuities to illegitimate children, such as appellees, who are dependent on but do not live with the federal employee.[5] The court likened this "underinclusiveness" to the "underinclusiveness" found fatal in *Jiminez* v. *Weinberger*, 417 U.S. 628, 637 (1974), which invalidated an absolute depriva-

[5] Several other lower federal courts have declared the lived-with requirement unconstitutional. *Myers* v. *Commissioners of Civil Service Comm'n*, Civ. No. 8682 (S.D. Ohio Aug. 8, 1977); *Proctor* v. *United States*, 448 F. Supp. 418 (D.D.C. 1977); *Tenny* v. *United States*, 441 F. Supp. 224 (E.D. Mo. 1977); *Jenkins* v. *OPM*, Civ. No. 78-0317 (D.D.C. Nov. 9, 1978), appeal pending, No. 79-1199 (D.C. Cir.). The issue has been presented to this Court once before, in *Myers;* the Court remanded for reconsideration in light of *Mathews* v. *Lucas, supra.* See 427 U.S. at 909. The Solicitor General decided not to appeal from the decision on remand in *Myers*, and he did not appeal in *Gentry* because the time to seek review expired before he learned of the entry of the final judgment. Further developments in the law since *Mathews* v. *Lucas*, including this Court's decision in *Lalli*, have made it appropriate to ask this Court to rule on the constitutionality of the statute despite the decision not to docket an appeal in *Proctor* or *Tenny*.

tion of disability benefits for most illegitimate children born after the onset of a parent's disability while allowing afterborn legitimate children to receive benefits.

But any statutory rule broad enough to be administered with speed and convenience necessarily results in either "under" or "overinclusiveness" with respect to the statutory goal. Here, underinclusiveness may be eliminated entirely only by granting factual hearings to all illegitimate children on the issue of dependence. This Court never has held that such individualized determinations are constitutionally required merely because a rule concerning illegitimate children is underinclusive. To the contrary, "presumptions in aid of administrative functions, though they may approximate, rather than precisely mirror, the results that case-by-case adjudications would show, are permissible under the Fifth Amendment, so long as that lack of precise equivalence does not exceed the bounds of substantiality tolerated by the applicable level of scrutiny." *Mathews* v. *Lucas*, *supra*, 427 U.S. at 509.[6] For example, in *Lalli* v. *Lalli*, *supra*, the state imposed a rule that in order to inherit from his intestate father, an illegitimate child must have obtained an "order of filiation" during the lifetime of the father. This rule was challenged as underinclusive because it excluded, among others, recognized children and children found to be

[6] Cf. *Vance* v. *Bradley*, No. 77-1254 (Feb. 22, 1979), slip op. 14-15; *Califano* v. *Aznavorian*, No. 77-991 (Dec. 11, 1978), slip op. 5; *Califano* v. *Jobst*, 434 U.S. 47 (1977); *Mathews* v. *De Castro*, 429 U.S. 181 (1976).

offspring of the father in paternity suits during his lifetime. This Court, observing that "few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results" (plurality slip op. 13), sustained the classification. The need for finality of judgments distributing property, and the concomitant need to be able to identify heirs would have been compromised if recognized illegitimate children and children in successful paternity suits would have to be located and served with process before distribution of the estate.

In the operation of the survivors' annuity program it is likewise important that eligible children be easily and promptly identified. An eligible child may apply for his annuity up to 30 years after he becomes eligible for it. 5 U.S.C. 8345(h)(2). Even when the recipient applies many years after his first eligibility, he is entitled to receive retroactive payments back through the day after the death of the employee. See 5 U.S.C. 8341(e)(2) and 8345. In the meantime, however, the full benefits may have been paid as a lump sum, as here, to a third-party on the assumption that there are no eligible children. Where there are more than three children, moreover, the amount of any one surviving child's annuity depends on the number of children claiming through the deceased employee; inasmuch as the Act places a ceiling on the total amount that may be paid to all children claiming through a single employee, the total is divided equally among all eligible children, 5 U.S.C. 8341(e). As this case illustrates, when children make late claims, earlier overpayments to other claimants,

unless waived, must be recovered by the government (see 5 U.S.C. 8346(b)).[7] Thus, disruption of the operation of the survivors' annuity program occurs where illegitimate children who did not live with the civil servant appear years after his death and demand to participate in the annuity fund. The lived-with requirement facilitates identification from the outset of *all* eligible children. It also sets up an easily administrable and reasonably reliable test for dependence. The proper balance among the competing goals of assisting all those likely to have been dependent on the wage earner, providing benefits large enough to achieve the statutory goal, remaining within the fiscal limitations of the fund, and avoiding undue disruption of the claims and payment process is peculiarly a legislative matter. The balance of these interests struck by 5 U.S.C. 8341 has an "evident and substantial relationship" to these goals.[8]

2. The Court of Claims lacked jurisdiction in this case. The jurisdiction of the Court of Claims rests

[7] In the present case, the government paid the full amount of the employee's contributions in a lump sum to the father of the employee after concluding that there were no eligible children or other annuitants. When appellees sued in the Court of Claims, the United States filed a third-party complaint against the father to recoup the payment in the event appellees were successful (App. A, *infra*, 2a n.3; App. B, *infra*, 7a).

[8] OPM has recommended proposed legislation to the current Congress that it eliminate the lived-with requirement. S. 509, 96th Cong., 1st Sess. (1979); H.R. 2584, 96th Cong., 1st Sess. (1979). That legislation has not been acted on by the responsible committees, however.

on its ability to award money damages as an accrued liability. It can afford prospective relief only if that relief is ancillary to a monetary award. Here, however, monetary relief is barred by sovereign immunity, and thus the court lacked jurisdiction to afford a remedy of any sort. Our argument here is the same as our argument on one of the questions that the Court will consider in *Califano* v. *Boles*, No. 78-808, prob. juris. noted (Jan. 22, 1979).[9]

Monetary relief for past injury is not available against the United States unless Congress has specifically authorized such relief and unequivocally waived its sovereign immunity. *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *King*, 395 U.S. 1, 4 (1969). See also *Quern* v. *Jordan*, No. 77-841 (Mar. 5, 1979); *Nevada* v. *Hall*, No. 77-1337 (Mar. 5, 1979); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). No statute authorizes payments for past periods during which payment was withheld pursuant to a statute that is later declared to be unconstitutional.[10] Consequently, only prospective relief, running from the date of judgment, is available to plaintiffs such as appellees who challenge a statute that denies benefits.

Because the Court of Claims could not award money damages, it lacked jurisdiction to award equitable

[9] See pages 25-32 of our brief in *Boles*. We have furnished a copy of that brief to counsel for appellees.

[10] Here, as in *Boles*, the only arguably pertinent statutes simply authorize a court to order the payment of money when the Executive Branch has failed to pay benefits that the statute itself requires to be paid. Here, however, the statute does not authorize the payment of benefits to appellees.

relief by ordering OPM to place appellees on the annuity rolls. "Throughout its entire history [the Court of Claims'] jurisdiction has been limited to money claims against the United States Government." *United States* v. *King*, 395 U.S. 1, 2-3 (1969); *United States* v. *Testan*, 424 U.S. 392, 397-398 (1976). The court is not authorized to award equitable relief (*id.* at 398).[11] The judgment in this case thus must be vacated, and the complaint dismissed, whether or not the lived-with requirement is constitutional.[12]

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[11] 28 U.S.C. 1491 provides that the Court of Claims may provide limited equitable relief "incident" to a money judgment in order to provide "an entire remedy and to complete the relief afforded by the judgment * * *." The provision, added in 1972 (Pub. L. No. 92-415, Section 1, 86 Stat. 652), applies only when the Court of Claims already has proper jurisdiction to award a money judgment. It is not authority for ordering equitable relief incident to an improper award of money damages. See S. Rep. No. 92-1066, 92d Cong., 2d Sess. 1-3 (1972); H.R. Rep. No. 92-1023, 92d Cong., 2d Sess. 2-3 (1972). Therefore, since the entire money judgment here was impermissible, the court improperly ordered the agency to put appellees on the annuity rolls.

[12] This does not mean that appellees have no remedy. They may seek an injunction in a district court to require OPM to put them on the annuity rolls. Congress has waived sovereign immunity in suits seeking injunctions. 5 U.S.C. 702. Indeed, appellees may already be members of the nationwide plaintiff class in *Jenkins* v. *OPM*, Civ. No. 78-0317 (D.D.C. Nov. 9, 1978), appeal pending, No. 79-1199 (D.C. Cir.), in which the district court held the lived-with requirement unconstitutional and ordered OPM to discontinue using it to deny annuities to class members. Although the government is appealing that decision, appellees may be entitled, as class members, to whatever equitable relief finally is ordered in *Jenkins*.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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APRIL 1979

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

SHAWN D. CLARK and TRICIA D .CLARK,
Minors, by Patricia I. Clark, their Legal Guardian

v.

THE UNITED STATES

Before DAVIS, *Judge*, Presiding, KUNZIG, and BENNETT, *Judges*.

ORDER

This is a suit, brought on behalf of Shawn D. Clark and Tricia D. Clark (minor children, plaintiffs), for recovery of death benefits and survivor annuities allegedly due them pursuant to the Civil Service Retirement Act of 1930, as amended. 5 U.S.C. §§ 8331-48 (1970). Upon the death of their father, George G. Isaacson, an employee of the Veteran's Administration, the children made timely application to the Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health (BRIOH) for payment of benefits under 5 U.S.C. § 8341(e). BRIOH denied their claim pointing to statutory language which required illegitimate children to have

lived with their father in a "regular parent-child relationship" in order to qualify for survivor annuities.[1] After the * * * determination,[2] the plaintiffs filed suit in this court. The matter is now before us on plaintiffs' motion for summary judgment.[3]

Subsequent to the filing of the instant case, this court has had occasion to deal with the precise statutory provisions now before us. In *Gentry* v. *United States*, 212 Ct.Cl. 1, 546 F.2d 343 (1976),[4] we held

---

[1] 5 U.S.C. § 8341 provides, in pertinent part, as follows:

§ 8341. *Survivor annuities.*

(a) For the purpose of this section—

(3) "child means—

(A) * * * (ii) a stepchild or recognized natural child who lived with the employee or Member in a regular parent-child relationship;

[2] The CSC held that there was no "regular parent-child relationship" at the time of the father's death notwithstanding the following facts: George Isaacson was the father of both children, he had in fact lived with them and their mother under the same roof for some six years, he had thereafter been subject to a court decree to pay child support, and he had continued to provide child support until the time of his death.

[3] This court is aware of defendant's assertion that, after finding the children not eligible, CSC made an award of $7,755.12 to the father of George G. Isaacson. In 1976, defendant filed a contingent third party cross-motion against the father, but defendant has not followed up on its third party cross-motion, and it is not before the court on this motion for summary judgment.

[4] The case is also reported at 212 Ct.Cl. 27, 551 F.2d 852 (1977) (Order denying Defendant's Motion for Rehearing). Defendant, perhaps because of the compelling factual circumstances present in the case now before us (*see* note 2, *supra*), has apparently abandoned its contention (which it made on motion for rehearing in *Gentry*) that some determination as to "degree of dependency" might be necessary.

a portion of 5 U.S.C. § 8341 to be unconstitutional insofar as it discriminates between legitimate and illegitimate children solely on the basis of their status at birth. Since the Government now quite properly concedes that *Gentry*, *supra*, is dispositive of the case now before us, the only issue to decide is whether we should remand to the CSC as we did in *Gentry*.

Despite the Government's request that we remand to the CSC for further factual determination, it is not appropriate to do so in this case. In *Gentry*, it was necessary to determine "whether plaintiff is in fact the child of the deceased annuitant, and whether the latter recognized and supported him as such." *Gentry*, *supra* at 355. Here, on the other hand, there is no dispute over the facts of parentage, recognition, and support. Indeed, a prior, valid, judgment is conclusive on these points. *Clark* v. *Isaacson*, No. 5625 (Dist. Ct., 1st Dist. of Mont., Broadwater County, June 2, 1972). As there are thus no factual determinations to be made bearing on the right to recover, a remand to the CSC would serve no purpose.

In summary, on the uncontested facts of parentage, recognition, and support, plaintiffs have shown that they have a right to recover the benefits provided by 5 U.S.C. § 8341(e). Because this court has previously held a portion of 5 U.S.C. § 8341 to be unconstitutional insofar as it discriminates between legitimate and illegitimate children solely on the basis

of their status at birth, and since there are no factual issues which require CSC determination, we hold that plaintiffs are entitled to recover the annuity provided by the statute.

Accordingly, IT IS HEREBY ORDERED, upon consideration of the pleadings and exhibits, without oral argument, that plaintiffs' motion for summary judgment is granted. Judgment is therefore entered for plaintiffs, and the cause is remanded to the Trial Division for further proceedings under Rule 131(c) to determine the amount to be awarded plaintiffs, consistent with this opinion.

January 27, 1978

BY THE COURT

/s/ Oscar H. Davis
OSCAR H. DAVIS
Judge, Presiding

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

PATRICIA ILENE CLARK, Legal Guardian of Shawn Douglas Clark and Tricia Deanne Clark, minors, and Shawn Douglas Clark and Tricia Deanne Clark individually, PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

and

GEORGE G. ISAACSON, THIRD-PARTY DEFENDANT

Before FRIEDMAN, *Chief Judge*, BENNETT and SMITH, *Judges*.

ORDER

This suit was brought on behalf of two minor children for recovery of death benefits and survivor annuities due them pursuant to 5 U.S.C. §§ 8331-8348 (1970). We granted plaintiffs' motion for summary judgment as to the liability question and remanded the case to the trial division for further proceedings under Rule 131(c) to determine the amount to be

awarded plaintiffs. *Clark* v. *United States*. Ct. Cl. No. 285-76 (order, Jan. 27, 1978). The parties, on August 11, 1978, submitted a stipulation for the entry of judgment which we have reviewed and accept in its entirety.

On September 7, 1976, defendant moved the court, pursuant to Rule 41(a)(2), to summon George G. Isaacson as a contingent debtor in this case. By order dated September 23, 1976, the court allowed defendant's motion, issued said summons and filed defendant's contingent cross-claim against the third party. The third party was personally served the summons by a U.S. Marshal and has failed to respond to defendant's claim.

The basis of defendant's contingent cross-claim was that defendant had made payment of $7,755.12 to the third party upon the finding that the above-named plaintiffs were not entitled to benefits. Upon our finding that the plaintiffs herein were entitled to the benefits, it is concluded that the third party was not entitled to the payment. Therefore, we grant judgment *pro confesso* under Rule 41(f) in favor of defendant against the third party.

IT IS THEREFORE ORDERED that defendant pay Patricia Ilene Clark, in her capacity as legal guardian, on behalf of Shawn Douglas Clark, the amount of $7,081.33 and, on behalf of Tricia Deanne Clark, the amount of $7,081.33, such amounts being those due and owing up to June 30, 1978.

IT IS FURTHER ORDERED that Shawn Douglas Clark and Tricia Deanne Clark be placed on the ap-

propriate Civil Service Commission annuity rolls for continued payments of the children's survivor annuity, pursuant to 5 U.S.C. § 8341(e), from June 30, 1978, to the expiration of their eligibility.

IT IS FURTHER ORDERED that judgment be entered in favor of the United States against George G. Isaacson in the amount of $7,755.12.

November 6, 1978

BY THE COURT

/s/ Daniel M. Friedman
DANIEL M. FRIEDMAN
Chief Judge

APPENDIX C

IN THE UNITED STATES COURT OF CLAIMS

No. 285-76

PATRICIA ILENE CLARK, et al., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

NOTICE OF APPEAL

Notice is hereby given that the defendant hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252 and 2101(a), from the order of the Court of Claims entered in this action on January 27, 1978, and from the final order of the Court of Claims entered in this action on November 6, 1978.

December 5, 1978

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